No. 11,581

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. DAGGS,

Appellant,

vs.

GROVER C. KLEIN, Rear Admiral, United States Navy, Commandant, Mare Island Navy Yard and JAMES V. FORRESTAL, Secretary of the Navy,

Appellees.

APPELLANT'S OPENING BRIEF.

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Appellees.

APPELLANT'S OPENING BRIEF.

JURISDICTION.

The jurisdiction of the District Court to entertain this action is conferred by Section 24, amended, of the Judicial Code (28 U.S.C. 41). The jurisdiction of the Circuit Court of Appeals to review the District Court's final order dismissing the action for lack of jurisdiction is conferred by Section 128, amended, of the Judicial Code (28 U.S.C. 225).

STATUTES INVOLVED.

Section 6 of Title 1 of Chapter 440 of the Act of June 28, 1940 (54 Stat. 679) as amended on August 21, 1941, by Chapter 385 (55 Stat. 654), so far as is relevant to this proceeding, provides:

> "That during the national emergency declared by the President on September 8, 1939, to exist, the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; 5 U.S.C. § 652), shall not apply to any civil-service employee of the War or Navy Departments or of the Coast Guard, or their field services, whose immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security, but nothing herein shall be construed to repeal, modify, or suspend the proviso in that section. Those persons summarily removed under the authority of this section may, if in the opinion of the Secretary concerned, subsequent investigation so warrants, be reinstated, and if so reinstated, shall be allowed compensation for the period of such removal at the rate they were receiving on the date of removal: *And provided further,* That within thirty days after such removal any such person shall have an opportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement or affidavits, or both, as he may desire to show why he should be retained and not removed." (50 U.S.C. App. 1156.)

Section 6 of the Act referred to in the foregoing excerpt reads in part as follows:

"No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; * * *" (5 U.S.C. 652).

QUESTIONS PRESENTED.

1. Whether there is involved in this proceeding a question arising under the Constitution and laws of the United States.

2. Whether the Court below erred in dismissing the action for lack of jurisdiction.

3. Whether the Court below had jurisdiction to proceed with the action.

THE PLEADINGS.

The action was instituted by the filing of a complaint on May 6, 1946. (T.R., 2-11.)* The gravamen of the complaint is that appellant, a Federal Civil Service employee at the Mare Island Navy Yard, was discharged from his employment there by the appellees and their predecessors in office, officers of the

*References to the Transcript of Record will be cited herein as T.R.

United States government, in violation of his rights under the Constitution of the United States and of his rights under the provisions of the above-quoted Act of Congress of June 28, 1940; the violation is alleged to have occurred in that within thirty days after his removal, appellant was not "fully informed of the reasons for such removal,"* and consequently

---

*The complaint set forth the *verbal* statement given to appellant in connection with his discharge:

> "Since September, 1939, the United States of America has been under a condition of emergency which has now been declared by the President to be unlimited. Under this condition, in spite of the very liberal governmental labor policy in the employment of its citizens, it has been incumbent upon all of its employees so to conduct themselves that there should be not the least concern on the part of their associates or their administrative officials as to their unquestioned adherence to the principles of the government and their loyalty in furthering its defense against enemies within or without.
>
> "Despite the constitutional rights of individuals as to freedom of speech and political opinion, these rights are not directly concerned in the right to actual employment in a governmental activity. This, each individual must maintain for himself by the correctness of his attitude and his behaviour.
>
> "Mr. Daggs, your discharge was warranted by the demands of national security and was made from this Navy Yard because a *confidential investigation disclosed that you do not possess the requisite degree of loyalty to the United States to remain an employee at this Navy Yard since you have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States.* You are advised that within thirty days from the date of this interview, Thursday, July 24, 1941, you have the privilege of submitting any statement or affidavit, or both, which you may desire to show why you should be retained and not discharged. These must be submitted in writing."

Appellant contends that this vague and indefinite statement does not meet the requirement of the statute.

The information to appellant was given *orally* (paragraph VIII of the Complaint [T.R., 5] alleges that appellant was "personally informed"); the District Court was obviously in error when it said that there was a "pleading [of] the *written* evidence of such information" (T.R., 17).

not given an opportunity to submit "such statement or affidavits, or both, as he (might) desire to show why he should be retained and not removed."

On September 3, 1946, the appellees filed their motion to dismiss the action upon the grounds that the court lacked jurisdiction over the person of the appellee Forrestal, that the court lacked jurisdiction over the subject matter of the complaint, that the suit was in effect one against the United States which had not consented to be sued, that the complaint failed to state a cause of action against the defendants on which relief could be granted, and that the suit might not be maintained in the absence of the appellee Forrestal who was asserted in the motion to be an indispensable party. (T.R., 11-12.)

THE OPINION OF THE DISTRICT COURT.

On November 27, 1946, the District Court issued its Memorandum Opinion on Motion to Dismiss and Order Dismissing Action (T.R., 13-18), in which the court, after reviewing the contentions advanced by government counsel, recited: "Nevertheless, for reasons hereafter appearing, if no motion to dismiss had been filed, the Court, sua sponte, would have and does now observe that it lacks jurisdiction to entertain the cause." (T.R., 14.)

The Court thereupon summarized the allegations of the complaint and then found that, "On its face the complaint shows that this action does not arise under

the Constitution or any law of the United States." (T.R., 16.) The Court then proceeded to develop this theory and, as indicated, ordered the action dismissed for lack of jurisdiction.

ARGUMENT.

As indicated above, the decision of the Court below appears to have been based upon a theory somewhat different from that advanced in the motion to dismiss. In this argument we shall consider first the reasoning and authorities cited in the opinion of the Court below as the basis for its ruling and endeavor to establish that on its own grounds the Court's opinion was erroneous and should be reversed. We shall then examine the authorities cited by appellees in support of their motion to dismiss and endeavor to establish that they are not well taken. We shall thereupon urge upon this Court a reversal of the order below with a clear expression of its opinion that not only is there a federal question here presented but that the Court below does have jurisdiction in all respects as that question is raised by the motion to dismiss so that the matter may be remanded to the trial court with instructions to proceed on the merits.

I. THERE IS A FEDERAL QUESTION PRESENTED.

A. THE CASES CITED BY THE DISTRICT COURT.

In support of its assertions that no federal question was presented, the Court below cited *Leather Manufacturers Bank v. Cooper,* 120 U.S. 778, 7 S. Ct.

777, 30 L. Ed. 816 (1887), and *Campbell v. Chase National Bank,* 71 F. (2d) 669 (C.C.A. 2, 1934). Both of these cases are clearly distinguishable.

Leather Manufacturers Bank v. Cooper, supra, was an action brought in the state court by Cooper against the bank for the purpose of recovering a balance due to Cooper on an open account. The bank had been organized under the provisions of the National Banking Act and it removed the suit to the federal court on the ground that since it was a national bank the suit was one arising under the laws of the United States. Cooper's motion to remand was granted and the Supreme Court affirmed.

The Act of July 12, 1882, which provided for the extension of the corporate existence of national banks, contained the following language with respect to the jurisdiction of federal courts:

> "* * * the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed." (7 S. Ct. 777.)

In affirming the order granting the motion to remand, the Supreme Court pointed out that this statute

repealed "in express terms" all laws inconsistent with its provisions and that it enacted that jurisdiction for suits thereafter brought by or against national banks would be the same as the jurisdiction for suits by or against banks not organized under any federal laws. The court said:

> "This was evidently intended to put national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." (7 S. Ct. 778.)

It is true that under earlier federal statutes federal and state courts had had concurrent jurisdiction of suits involving national banks. However, as the court pointed out:

> "* * * the Act of 1882 provided, in clear and unmistakable terms that the courts of the United States should not have jurisdiction of the suits thereafter brought * * * The provision is not that no such suit shall be brought by or against such a national bank in a federal court, but that a federal court shall not have jurisdiction. This clearly implies that such a suit can neither be brought nor removed there; for jurisdiction of such suits has been taken away, unless a similar suit could be entertained by the same court by or against a state bank in a like situation with the national bank. Consequently, so long as the Act of 1882 was in force, nothing in the way of jurisdiction could be claimed by a national bank because of the source of its incorporation." (7 S. Ct. 778.)

It is clear that this decision is no authority for the ruling of the court below in the instant case. In the

Leather Manufacturers' Bank Case the federal courts were bound by a statute which in unmistakable terms deprived them of jurisdiction. Thus, even though a federal question might have been presented by virtue of the fact that the defendant bank was organized under a federal statute (a question which the Court did not have to decide), jurisdiction was specifically taken from the federal courts by the statute cited. There is, of course, no such statute applicable to the instant case and consequently no guidance can be obtained from the decision in the *Leather Manufacturers' Bank Case.* On the contrary, in the case now before the Court, there is a specific claim of right arising from a federal statute, to-wit: the Act of June 28, 1940.

Campbell v. Chase Nat. Bank, supra, was an *equity* action brought in the federal district court by Campbell against the bank to restrain the bank from transferring gold bullion. The complaint was dismissed for want of jurisdiction and the circuit court affirmed. The facts indicated that Campbell owned several marked bars of gold bullion which he had delivered to the bank for safekeeping and that on September 13, 1933 the bank informed him that it was required to surrender such bullion to the United States Treasury because of, and pursuant to, an executive order issued by the President of the United States. On September 16, 1933 Campbell demanded the delivery of the bullion to him, which demand was refused, and thereupon the suit was started.

The theory of plaintiff's suit was that he was entitled to relief because of the threatened misappro-

priation of his bullion and because of the practical disappearance of his opportunity to possess gold bullion due to the allegedly unconstitutional order of the government. The court in affirming the decision below pointed out that in so far as plaintiff sought to establish the existence of a federal question he did so by anticipating a defense based on the statute upon which the executive order was predicated. The court clearly stated as follows:

> "* * * appellant's (plaintiff's) ownership with right of possession is not dependent upon the federal law or constitution. [citing cases] * * * Jurisdiction is claimed solely on the ground that the cause of action arose under the Constitution and laws of the United States. *The statute is asserted to be unconstitutional.* The general rule is that, when it appears from the bill of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States and such federal claim is not merely colorable and rests upon a reasonable foundation, the court has jurisdiction. What constitutes a cause arising under the laws of the United States has been pointed out by the courts. In First National Bank v. Williams, 252 U.S. 504, 512, 40 S.Ct. 372, 374, 64 L.Ed. 690, it was said:
>
> > 'One does so arise where an appropriate statement by the plaintiff, *unaided by any anticipation or avoidance of defenses,* discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of an act of Congress. If the plaintiff thus asserts a right which will be sustained by one construction of the law, or de-

> feated by another, the case is one arising under that law.'
>
> "Here the claim is colorable, *it anticipates a defense,* for the claim necessarily rests upon the contention that whatever money appellant might recover *at law* could not repurchase gold bullion *because the statutes and orders make purchases impossible.* L. & N. R.R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 43, 53 L.Ed. 126; Taylor v. Anderson, supra. [234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218]. The validity or invalidity of the statute and orders does not affect the jurisdiction. If valid, no cause for a federal suit exists; if invalid, a gold purchase was possible. It could be replaces. The cause of suit cannot depend upon the validity of the statute." (71 F.(2d) 670.) (Italics supplied.)

The *Campbell Case* is thus seen to be authority only for the proposition that a federal question arises when it appears from the face of the complaint, *unaided by the anticipation or avoidance of defenses,* that the suit is one arising under the Constitution or laws of the United States. That, of course, is precisely the situation in the instant case. Not only does appellant allege in the first paragraph that the suit arises under the Constitution and laws of the United States, but he alleges in the seventh paragraph just which one of the laws of the United States is involved and he alleges in the eleventh paragraph what rights he is claiming under that law and how the action of appellees constituted a violation of that law and of those rights. Appellant nowhere anticipates any de-

fenses or seeks to project the existence of a federal question upon such anticipated defenses. Consequently, the rule of the *Campbell Case* is not applicable to the instant proceeding.

The Court below further stated that "To come within the jurisdiction of the District Court on the basis pleaded more is required than that the right sought to be enforced originated in a federal law." (T.R., 17), and, as authority, cited *Cook County v. Calumet, etc., Co.,* 138 U.S. 635, 11 S.Ct. 435, 34 L.Ed. 1110 (1891). With this general proposition of law, appellant has no quarrel. Appellant believes that his complaint shows that more is involved in this proceeding than the fact that the right sought to be enforced originated in a federal law. Not only did the right originate in a federal law but also the basis of the action arose out of an alleged violation of that law by the appellees. There is also involved an implicit* conflict between the parties with respect to the construction of that law. Appellant contends that the information given by the government officers of the reasons for their discharge of appellant did not meet the test of the

*This conflict is *implicit* rather than *explicit* because in the present state of the pleadings it is not clear what the appellees' position is or will be with respect to the question of whether or not the statement of the officer set forth in paragraph VIII of the complaint (T.R., 5-6) constitutes the "full" information required by the statute. It is appellant's contention for the reasons set forth in paragraphs X, XI, and XII, of the complaint (T.R., 7-9) that he was not "fully informed" of the reasons for his discharge whereas it is apparent from the entire record and particularly from the opening allegations of paragraph X of the complaint that appellees contend that he was fully informed. There is thus raised a conflict as to the construction or effect of the federal statute involved.

statute that he be "fully informed" of the reasons thereof while appellees contend that it did.

That the instant case involves the "more" which the trial court required as a basis for federal jurisdiction, is further seen in an analysis of the *Cook County Case* and a comparison of that case with the instant one.

Cook County v. Calumet, etc., Co., supra, was an action of ejectment brought in the state court. The question involved the title to certain land which originally was vested in the United States. By an act of Congress in September of 1850, the federal government granted this land to the State of Illinois. By an act of the Illinois legislature in 1852, amended in 1854, this land was granted to the county in which it was situated but it was provided that if any of the lands had been sold by the United States since the act of 1850, the county should convey such land to the purchasers. In this action the state court held that as the land in question had been sold by the United States before the passage of the bill by the Illinois legislature, the county had acquired no beneficial interest in the land.

On a writ of error, the Supreme Court pointed out that the judgment of the state court holding that the county had acquired no beneficial interest to the land,

> "proceeded wholly upon he construction of the terms and conditions of the grant of the state to the county by the act of 1852, and as amended by the act of 1854, and the validity of those enactments was not drawn in question." (11 S.Ct. 440.)

The Supreme Court said further:

> "There was no decision against claim or title asserted under the United States, but simply that the county did not obtain title under the grant of the state; that the Act of 1852 imposed a positive duty on the county to transfer such title as it acquired to the purchaser from the United States, and that where lands had been bought in good faith from the United States, the title to such lands did not become vested in the county but passed to the purchaser under his entry. This construction by the state court of the laws of the state is controlling in the premises. [Citing cases.]
>
> * * * * * * *
>
> "As the acts of congress referred to in the first and second errors assigned did not purport to vest title to swamp lands in cook or any other county, and the court only passed upon the alleged grant by the State, we are unable to perceive that any federal question was, in this regard, necessarily or in fact decided." (11 S.Ct. 440.)

It is clear that in the *Cook County Case* what was involved was the construction by the state court of a state statute and nothing more. In the instant case, of course, there is nothing of this nature involved. While the basis for the federal claim in the *Cook County Case* was remote, in the instant case it is direct. In the instant case appellant relies entirely upon the Act of June 28, 1940, and directly alleges its violation by the appellees. In the *Cook County Case* plaintiff did not rely upon any federal statute

but relied exclusively upon a state enactment. Clearly the cases are distinguishable, and furthermore, the disparity between them shows how definitely there is involved in the instant case a federal question.

The court below cited a series of cases for the proposition that, "To arise under a law of the United States an action must involve a controversy respecting the validity, construction or effect of the law pleaded upon the determination of which the result would depend." (T.R., 17.) Here again appellant has no quarrel with this general statement of law. We believe that the record in the instant case shows that there is a controversy respecting the construction or effect of the law pleaded and that if appellant's interpretation prevails, he will be entitled to the relief sought since it will be determined that he did not receive the full information required by the act, his discharge will be held to have been unlawful, and he will be entitled to reinstatement with back pay; whereas if appellees' interpretation prevails, it will be found that appellant did receive the full information required by the act, that his discharge was lawful, and that he is entitled to no relief. However, in order again to show the distinctions between the case at bar and the cases relied upon by the district court to support its opinion, we will analyze those cases at this point.

Shulthis v. McDougal, 225 U.S. 561, 32 S.Ct. 704, 56 L.Ed. 1205 (1912), was an action brought in the federal court for the purpose of determining conflicting claims to a tract of land alloted to the Creek nation. The trial court entered a decree for the de-

fendants which was affirmed by the Circuit Court of Appeals. Plaintiffs appealed to the Supreme Court and defendants moved to dismiss the appeal on the ground that judgments or decrees of the Circuit Courts were final in all cases in which federal jurisdiction was dependent entirely upon diversity of citizenship. In opposing the motion to dismiss the appellants maintained that the case arose under certain laws of the United States and therefore was not one in which jurisdiction depended *entirely* upon diversity of citizenship. The appeals were dismissed, the Supreme Court holding that this cause did not arise under the laws of the United States to which appellant had referred.

After stating the rules by which jurisdictional requirements must be tested (e.g., that they must be determined from the complainant's statement of his own cause of action as set forth in his bill without reference to the other pleadings; that jurisdiction may not be inferred argumentatively, but must be affirmatively and distinctly set forth; and that the suit must really and substantially involve a controversy respecting the validity, construction or effect of a federal statute), the court considered the contention of appellants in the case before it. Appellants directed attention to certain federal statutes relating to the allotment of lands of the Creek nation, the leasing and alienation thereof, and the rights of the Indians thereunder. Having pointed this out the court said:

> "* * * *but the bill makes no mention of those statutes* or of any controversy respecting their

validity, construction or effect. Neither does it by necessary implication point to such a controversy. * * * So, looking only to the bill as we have seen that we must, it cannot be held that the case as therein stated was one arising under the statutes mentioned. As was said in Blackburn v. Portland Gold Min. Co., 175 U.S. 571, 44 L.ed. 276, 20 Sup. Ct. Rep. 222, 21 Mor. Min. Rep. 358, a controversy in respect to lands has never been regarded as presenting a federal question, merely because one of the parties thereto has derived his title under an act of Congress." (32 S.Ct. 706-7.) (Italics supplied.)

Thus it is clear that the decision in the *Shulthis Case* is simply authority for the proposition that *when plaintiff's pleading fails to specify the federal statute under which he claims his rights, it cannot be said any federal question exists.* However, as we have pointed out above, and as the record now before the court shows, *the complaint in the instant case clearly and unmistakably not only identifies, cites and quotes the statute upon which it relies, but sets forth the facts which are alleged to constitute its violation.* For these reasons we believe that the instant case is clearly distinguishable from the *Shulthis Case* relied upon by the district court.

In re Winn, 213 U.S. 458, 29 S. Ct. 515, 53 L. Ed. 873 (1909), was an action in the state court against an interstate express company for damages resulting from negligent transportation. The shipment was from a point in Iowa to a point in Nebraska. The defendant removed to the federal court and plaintiff's

motion to remand was denied. Plaintiff thereupon brought this action, which was an original application for a writ of mandamus, to compel the federal district judge to remand the case. The petition was granted.

The basis for the original removal petition was that the suit was one arising under the laws of the United States. However, the court analyzed the defendant's removal petition as follows:

> "In substance the allegations of the petition for removal are, that the *defendant* was subject to the federal laws to regulate commerce, and that, *under those laws, the defendant had a defense in whole or in part to the cause of action stated in the declaration.*" (29 S. Ct. 516.) (Italics supplied.)

The Supreme Court invoked the familiar rule that a suit arises under the laws of the United States only when plaintiff's statement of his own cause shows that it is based upon federal rules and that it is not enough that it appears that the *defendant* may find in the federal constitution or laws some ground of defense. Therefore, since the cause of action itself was not based upon any law regulating interstate commerce, or upon any other law of the United States, the case could neither have been brought originally in the federal court nor removed to it.

Again the distinction between this case and the case at bar is obvious. In the cited case the contention that there was federal jurisdiction was predicated upon an anticipated defense. In the instant case federal jurisdiction is not predicated upon any such

thing; it is clearly and exclusively predicated upon the allegations of the complaint which have already been discussed.

Gully v. First Nat. Bank, 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70 (1936), was a suit by a state tax collector for the purpose of recovering taxes due the state. It appears from the complaint that in June of 1931 the assets of a national banking association were conveyed to the defendant under contract whereby the debts and liabilities of the association were assumed by the respondent which covenanted to pay them. Among these debts were taxes owing to the state. The new bank, in violation of its covenant, failed to pay these taxes and this suit was commenced in the state court. The bank filed a removal petition on the ground that the suit arose under the constitution or laws of the United States. The state court made an order accordingly and the federal district court denied a motion to remand. After trial on the merits the complaint was dismissed and the circuit court affirmed the judgment of dismissal, overruling the objection that the case was one which was triable in the state court.

The decision of the circuit court was put upon the ground that the power to tax the shares of a national bank had its origin and measure in the provisions of a federal statute and that by necessary implication plaintiff counted upon that statute in suing for the tax.

In reversing the Circuit Court of Appeals the Supreme Court, speaking through Mr. Justice Cardozo, first analyzed the familiar principles which

determine how and when a case arises under the constitution or laws of the United States. The court pointed out that

> "To bring the case within the statute a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. [Citing cases.] The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. [Citing cases.]" (57 S. Ct. 97.)

It is clear that this test is met in the instant case. It is also clear that the Supreme Court did not find that the test was met in the *Gully Case* because that case presented a factual situation dissimilar to the one at bar. After enunciating the principle discussed above, the court weighed the case against it and failed to find in the pleadings the elements of a federal question. It said, in the first place that

> "*The suit is built upon a contract which in point of obligation has its genesis in the law of Mississippi.* A covenant for valuable consideration to pay another's debts is valid and enforceable *without reference to a federal law.* For all that the complaint informs us, the failure to make payment was owing to a lack of funds or to a belief that a stranger to the contract had no standing as a suitor, or to other objections non-federal in their nature. There is no necessary connection between the enforcement of such a contract according to its terms and the existence of a controversy arising under the federal law." (57 S. Ct. 98.) (Italics supplied.)

In the second place the court pointed out that the argument of the defendant bank that the taxes are not valid debts unless lawfully imposed and that they cannot be lawfully imposed unless they are permitted under federal law, since the bank was a national bank, was not a valid argument, because "not every question of federal law emerging in a suit, is proof that federal law is the basis of the suit." (57 S. Ct. 99.) The court said that *the tax was imposed under state statute* and that while it must be consistent with federal statutes, *the federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it.*

As the cornerstone of his argument, Mr. Justice Cardozo recognized that the right sought to be established is one that is created *by the state statute.*

> "If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense. Tennessee v. Union & Planters' Bank, supra [152 U. S. 454, 14 S. Ct. 654, 38 L. Ed. 511]; Sawyer v. Kochersperger, 170 U. S. 303, 18 S. Ct. 946, 42 L. Ed. 1046; Arkansas v. Kansas & Texas Coal Co., 183 U. S. 185, 22 S. Ct. 47, 46 L. Ed. 144; Louisville & Nashville R. Co. v. Mottley, supra [211 U. S. 149, 29 S. Ct. 42, 53 L. Ed. 126]. That there *is* a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid." (57 S. Ct. 99). (Italics in original.)

The tax collector will have to prove that the state law has been obeyed before the court can reach the question as to whether there is anything in its provisions or in any administrative conduct under it which is inconsistent with federal law.

> "The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states." (57 S. Ct. 99-100.)

In our case the question of federal law is not merely "lurking in the background." It is in the direct forefront of the case, it is the basis of the case. We have no question of how far behind "state action" one must look to reach the question of federal law. There is no state action here. There is here an alleged violation by federal officers of a federal statute. It seems to us that not only is the distinction between our case and the *Gully Case* obvious, but that a consideration of the rationale of *Gully* and these other cases we are now considering points out how clear our case does in fact present a federal question.

Marshall v. Desert Properties Co., 103 F. (2d) 551, (CCA 9, 1939), was an action brought in the district court to quiet title to certain mining claims. The district court dismissed the action on the ground that no federal question was raised and plaintiffs appealed.

This court, speaking through Judge Stephens, analyzed the complaint and pointed out that it contained in addition to allegations respecting plaintiff's claim, other allegations setting up the nature of defendant's claim and the alleged invalidity thereof. These latter allegations were bottomed upon a federal statute which was plaintiff's basis for his claim of federal jurisdiction. The court pointed out that in an action to quiet title the nature of the adverse claim, its source and origin are immaterial, consequently these allegations of the bill were surplusage and could not properly be used as a basis for conferring jurisdiction upon a federal court. Since it was the unnecessary allegations which gave rise to the claim that the action arose under federal law, this court had no difficulty in finding that the district court was correct in dismissing the action for want of jurisdiction.

In the instant case there is no claim made by the government, nor is there anything in the district court's opinion to indicate, that any of the allegations in the complaint with respect to the federal statute upon which the appellant relies and its violation are surplusage and should therefore be stricken. On the contrary, if appellant has a cause of action at all, he has it under the basis of this federal statute and consequently it is apparent that there is federal jurisdiction.

This court further pointed out in the *Marshall Case* that:

> "Where there is no dispute between the parties as to the meaning of any Federal law, but the case involves only issues of fact, the case is not one arising under the constitution or a law or a treaty of the United States, although the respective interests are titles of the parties derived through such constitution, law or treaty. [Citing cases]. We do not think that there is a substantial dispute between the parties as to the meaning of the Mining Law involved." (103 F. (2d) 552-3.)

The instant case, of course, involves much more than an issue of fact between the parties. There is, as appears from the pleadings, an issue with respect to the application and construction of the federal statute. Appellant contends that the construction which the government places upon the words "fully informed" in the statute is an improper one while the government contends that it is proper. This raises more than an issue of fact; it raises an issue of law concerning the application and construction of a federal statute which issue can and must be resolved only in a federal court.

Chaskin v. Thompson, 143 F. (2d) 566 (CCA 9, 1944), was an action instituted in the state court for damages resulting from defendant's interference with plaintiff's business. Defendant removed the proceeding to the federal district court and plaintiff's motion to remand was denied. On plaintiff's appeal, the district court was reversed and instructed to remand the case to the state court.

The complaint alleged that the defendant had wrongfully and maliciously induced plaintiff's customers to breach contracts made with the plaintiff by falsely representing that the defendant was an employee of the United States Department of Agriculture, and that as such he had the power to cause plaintiff's customers great loss, and that he would do so unless they breached the contracts. This court, again speaking through Judge Stephens, held that such an action was not an action against an employee of the United States but was an ordinary action in tort against the defendant individually and was within the jurisdiction of the state court. The district court had held that the action was one against the defendant in his capacity as an employee of the United States and that consequently it had jurisdiction. Of this this court said:

> "The district court was mistaken. *The complaint is drawn as an ordinary action in tort,* the subject matter and the parties falling solely within the jurisdiction of the state court unless there is diversity of citizenship or unless the action arises under the Constitution and laws of the United States. Since diversity is not in the case, the question here turns upon whether or not the cause arises under the Constitution or laws of the United States." (143 F. (2d) 568.) (Italics supplied.)

This court then went on to consider the various principles of law which have been enunciated with respect to when and under what circumstances a cause arises under the Constitution and laws of the United States.

It considered many of the cases herein already referred to and reiterated the conclusion that a suit arises under the laws of the United States only when it so appears from the plaintiff's own statement of his case unaided by any defenses which may subsequently arise. It then said:

> "It seems clear that *appellant in his complaint relies wholly upon his state tort action, plainly alleging that everything complained of was the act of the individual.* The pleader alleges that the defendant-appellee acted unlawfully, wrongfully, intentionally and maliciously, and that he well knew that he had no lawful right to do as he is alleged to have done. The mere allegation in the complaint that defendant represented to the dealers that he was acting as an agent of a department of the government does not constitute the action one under the Constitution or laws of the United States. And, as has been seen by the authorities above quoted and cited, since the complaint does not lay the jurisdiction in federal court, such jurisdiction cannot be created by subsequent pleading or proof." (143 F. (2d) 569-70.) (Italics supplied.)

In the *Chaskin Case* this court correctly analyzed plaintiff's complaint and determined from that analysis that the basis for the cause of action was the ordinary tort law of the state. A similar analysis of the complaint in the instant case must convince the court that the basis for a cause of action, if one there be, is a federal statute which is alleged to have been violated by federal officers to the deprivation of appellant's constitutional and statutory rights. Obvi-

ously, there is no state jurisdiction here. There must be federal jurisdiction.

Barnhart v. Western Maryland Ry. Co., 128 F. (2d) 709 (CCA 4, 1942), was an action by a committee of employees against the railway company in the nature of a bill in equity seeking an injunction, an accounting and a determination of plaintiffs' status as employees of the railway company. It appeared from the complaint that under the provisions of the Transportation Act of 1920 (45 USC 131) a Railroad Labor Board was created for the purpose of promoting the amicable adjustment of disputes between railroads and their employees; that pursuant to proceedings had before the Board and orders issued by it, the defendant railroad had accepted certain rulings of the Board and had put them into effect so that they constituted contracts between the railroad and its employees, and that the railroad, in violation of these contracts, had dismissed certain of its employees.

The district court granted a motion to dismiss the complaint on the grounds that no federal question was presented. On appeal, the circuit court examined the complaint carefully for the purpose of determining whether or not the controversy arose under the laws of the United States since there was no question of diversity. The court analyzed the statute which created the Railroad Labor Board and pointed out that it differed radically from such legislation as the National Labor Relations Act or the Fair Labor Standards Act in that there was nothing in the rail-

road statute "* * * on which one could base a cause of action in a federal court by employees for damages sustained by a wrongful discharge. Accordingly * * * the decision of the Board was not binding on the appellee (the railway company) and did not constitute an enforceable adjudication of its obligations." (128 F. (2d) 712-3.)

The court said that this brought it to the pivotal point of the case which had been stated by the court below as follows:

> "'* * * clearly it cannot be said that the instant case "involves a dispute or controversy respecting the validity, construction or effect" of that statute [Transportation Act of 1920], upon the determination of which the result depends. The present complaint does not call upon the court to now determine either the validity, construction or effect of any provision of the Act creating the Railroad Labor Board. Such questions have been heretofore determined by the Supreme Court, and it is not my understanding from the argument of counsel for the plaintiffs that there is any effort in this case to distinguish or avoid the effect of those decisions. What is here involved is merely a controversy between the parties over an alleged wrongful discharge of the plaintiffs from employment existing after the passage of an Act of Congress, and possibly affected as to some of its working conditions by the published decisions of the Labor Board; *but the right of action asserted does not arise from any provision of the statute,* and the determination of the controversy does not depend upon any disputed validity, construction or effect of the

statute. In other words, the employment may have been inspired by the Act, but *a right of action for the defendant's alleged breach of the contract does not arise from the Act; but only from the subsequent contractual relations of the parties. The wrongful breach of such relations does not confer federal court jurisdiction unless there is diverse citizenship'.*" (128 F. (2d) 713.) (Italics supplied.)

The court then went on to consider the authorities, to many of which we have already referred, and stated its conclusion that the case, "at best, has merely its background in the existence of a federal law, but this origin alone is insufficient to invoke the jurisdiction of the federal courts." This was so because, "*A determination of the alleged rights of the appellants, here, involves, we think, no interpretation of either a federal statute or the terms of a decision of the Board.*" The court pointed out that after the Board had acted the alleged rights of the parties were incorporated in an agreement and, "thus became a matter of contract between the parties, *and any rights of the appellants, in this connection, arose, not out of the statute that set up the Board, not out of the action of the Board in promulgating the rules, but out of the contract itself.*" (128 F. (2d) 714.) (Italics supplied.)

As we have already pointed out the alleged rights of appellant, if any he has, arise squarely out of the federal statute, not out of any contract or any other source. It is apparent to us that the *Barnhart Case*

is not only distinguishable from the instant case, but that a careful reading of it shows how definitely and clearly the pleading in the instant case does raise a federal question.

Miller v. Long, 152 F. (2d) 196 (CCA 4, 1945), was an action brought in the district court seeking declaratory relief to the effect that a certain note and mortgage were null and void. Defendants moved to dismiss for lack of jurisdiction and, since no diversity of citizenship existed, it was necessary to establish that the suit arose under the constitution or laws of the United States in order to give jurisdiction to the district court. The district court found that this was no such suit and dismissed on that ground only. On appeal the circuit court affirmed.

The complaint alleged that plaintiff contracted with defendant that the latter would supply him with a home, the agreed cost of which was to be financed by an FHA loan, and that defendant was guilty of fraud in the transaction, and particularly in the making of false statements to the FHA with respect to the existence of incumbrances upon the property and with respect to the extent of certain down payments which were to be made. Plaintiff contended that the fraud was not only against him but was against the FHA and that the false statements violated certain criminal provisions of the National Housing Act, and that since the decision required an interpretation of that act, a substantial federal question was involved. The court, after reviewing the allegations of the complaint, said:

"We do not find that the existence of a federal question is shown on these facts. If the facts alleged are correct, certainly a grievous fraud has been committed, which merits the closest investigation by the federal authorities, but that fact alone does not make a federal question out of *a suit to annul the fraudulently procured second mortgage.*" (152 F. (2d) 197.) (Italics supplied.)

After reviewing the rules with respect to the existence of a federal question the court said:

"Plaintiff can obtain the complete relief sought in proceedings already commenced in the state courts and we are unable to find any substantial dispute as to the interpretation of any section of the National Housing Act (the only federal statute here involved) as a material factor in proceedings *to set aside a fraudulently procured second mortgage.* * * *

"Reduced to its essentials, plaintiff's case is one of fraud in the factum, that he was led to sign the instruments involved by the false and fraudulent statements of Long (defendant) as to the nature and contents of these instruments. *Plaintiff's civil rights derive solely from the State law;* the National Housing Act is silent in this field. Nor is plaintiff helped by virtue of the fact that Long may have committed a crime against the United States. That is res inter alios acta. There is no merit in plaintiff's contentions that a federal question is here present because the case involves the civil consequences of a federal crime, or because a question of 'federal policy' arises for the solution of which resort

must be had to the so-called 'federal common law'." (152 F. (2d) 197-8.) (Italics supplied.)

This case, like *Chaskin v. Thompson,* supra, involved nothing more than an ordinary tort action under state law and consequently the court was correct in refusing to take jurisdiction. However, that is not the problem presented by the pleading in the instant case and we think that the *Miller Case* is clearly distinguishable.

The district court also cited the case of *Bell v. Hood,* 150 F. (2d) 97 (CCA 9, 1945). In that case this court had affirmed an order of the district court dismissing a suit for want of jurisdiction on the ground that the action was not one that arose under the Constitution and laws of the United States. However, the Supreme Court of the United States granted *certiorari,* 326 U. S. 706, 66 S. Ct. 98, 90 L. Ed. 417 (1945), and reversed this court and the district court, 327 U. S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946).

The complaint therein alleged that petitioners were damaged as a result of the action of certain agents of the Federal Bureau of Investigation in imprisoning them in violation of their constitutional rights to be free from deprivation of liberty without due process of law, and in subjecting their premises to search and their possessions to seizure in violation of the constitutional right to be free from unreasonable searches and seizures.

The argument in support of the ruling of the lower courts was that the complaint merely stated a cause

of action for the tort of trespass which was made actionable by state law and therefore it did not raise any federal question. The Supreme Court pointed out that a mere reading of the complaint refutes this contention. In this connection we may observe that a mere reading of the complaint in the instant case should also refute that contention as it is made here.

The opinion of the Supreme Court is so well reasoned and is, so far as we know, the latest definitive word of that court on the subject that we feel constrained to quote from it at some length:

> "Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from the way it is drawn that petitioners seek recovery squarely on the ground that respondents violated the Fourth and Fifth Amendments. It charges that the respondents conspired to do acts prohibited by these amendments and alleges that respondents' conduct pursuant to the conspiracy resulted in damages in excess of $3,000. It cannot be doubted therefore that it was the pleaders' purpose to make violation of these Constitutional provisions the basis of this suit. Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent 'the party who brings a suit is master to decide what law he will rely upon, and * * * does determine whether he will bring a "suit arising under" the * * * [Constitution or laws] of the United States by his declaration or bill.' The Fair v. Kohler Die & Specialty Co., 228 U.S.

> 22, 25, 33 S. Ct. 410, 411, 57 L. Ed. 716. Though the mere failure to set out the federal or Constitutional claims as specifically as petitioners have done would not always be conclusive against the party bringing the suit, where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit. Thus allegations far less specific than the ones in the complaint before us have been held adequate to show that the matter in controversy arose under the Constitution of the United States. Wiley v. Sinkler, 179 U. S. 58, 64, 65, 21 S. Ct. 17, 20, 45 L. Ed. 84; Swafford v. Templeton, 185 U. S. 487, 491, 492, 22 S. Ct. 783, 784, 785, 46 L. Ed. 1005. The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy." (66 S. Ct. 775-6.)

This analysis, applied to the pleadings now before the court, will make it apparent that appellant has brought a suit arising under the Constitution and the laws of the United States by the allegations of his complaint. He has specifically alleged a violation by government officials of a statutory duty, which violation has deprived him of rights which are granted to him by the statute and of other rights which are guaranteed to him by the Constitution of the United States. Certainly the reasoning of the Supreme Court in *Bell v. Hood,* would indicate that appellant *has* raised a federal question. With respect to the argu-

ment that there is no jurisdiction because the complaint may fail to state a cause of action, the Supreme Court in *Bell v. Hood* said:

> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. Swafford v. Templeton, 185 U. S. 487, 493, 494, 22 S. Ct. 783, 785, 786, 46 L. Ed. 1005; Binderup v. Pathe Exchange, 263 U. S. 291, 305-308, 44 S. Ct. 96, 98-99, 68 L. Ed. 308.[2]* The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly in-

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*Footnotes 2 to 7 which follow are the Court's.

[2]For other cases discussing the distinction between questions going to the merits and those going to the jurisdiction, see the following: Illinois Central Railroad Co. v. Adams, 180 U.S. 28, 21 S.Ct. 251, 45 L.Ed. 410; Geneve Furniture Mfg. Co. v. S. Karpen & Bros., 238 U.S. 254, 35 S.Ct. 788, 59 L.Ed. 1295; and see Nashville & St. Louis Ry. v. Taylor, C.C., 86 F. 168.

substantial and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned. The Fair v. Kohler Die & Specialty Co., supra, 228 U. S. at page 25, 33 S. Ct. at page 411, 57 L. Ed. 716. But cf. Swafford v. Templeton, supra.

"But as we have already pointed out the alleged violations of the Constitution here are not immaterial but form rather the sole basis of the relief sought. Nor can we say that the cause of action alleged is so patently without merit as to justify, even under the qualifications noted, the court's dismissal for want of jurisdiction. The Circuit Court of Appeals correctly stated that 'the complaint states strong cases, and if the allegations have any foundation in truth, the plaintiffs' legal rights have been ruthless violated.' [150 F. (2d) 98.] Petitioners' complaint asserts that the Fourth and Fifth Amendments guarantee their rights to be free from unauthorized and unjustified imprisonment and from unreasonable searches and seizures. They claim that respondents' invasion of these rights caused the damages for which they seek to recover and point further to 28 U.S.C. §41(1), 28 U.S.C.A. §41(1), which authorizes the federal district courts to try 'suits of a civil nature' where the matter in controversy 'arises under the Constitution or laws of the United States,' whether these are suits in 'equity' or at 'law.' Petitioners argue that this statute authorizes the Court to entertain this action at law and to grant recovery for the damages allegedly sustained. Respondents contend that the Constitutional provisions here involved are prohibitions against the federal gov-

ernment as a government and that 28 U.S.C. §41 (1), 28 U.S.C.A. §41(1), does not authorize recovery in money damages in suits against unauthorized officials who according to respondents are in the same position as individual trespassers.

"Respondents' contention does not show that petitioners' cause is insubstantial or frivolous, and the complaint does in fact raise serious questions, both of law and fact, which the district court can decide only after it has assumed jurisdiction over the controversy. The issue of law is whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth amendments. That question has never been specifically decided by this Court. That the issue thus raised has sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it can be seen from the cases where this Court has sustained the jurisdiction of the district courts in suits brought to recover damages for depriving a citizen of the right to vote in violation of the Constitution.[3] And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[4] and to restrain individual state officers from

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[3]Wiley v. Sinkler, supra; Swafford v. Templeton, supra. See also Brickenhouse v. Brooks, C.C., 165 F. 534, 543, in which a similar suit was held to be within the jurisdiction of the federal court.

[4]Philadelphia Co. v. Stimson, 223 U.S. 605, 32 S.Ct. 340, 56 L.Ed. 570; Hays v. Port of Seattle, 251 U.S. 233, 40 S.Ct. 125, 64 L.Ed. 243; Pennoyer v. McConnaughty, 140 U.S. 1, 11 S.Ct. 699, 35 L.Ed. 363; City Railway Co. v. Citizens' St. Railroad Co., 166 U.S. 557, 17 S.Ct. 653, 41 L.Ed. 1114; City of Mitchell v. Dakota Central Telephone Co., 246 U.S. 396, 407, 38 S.Ct. 362, 365, 62 L.Ed. 793.

doing what the 14th Amendment forbids the state to do.[5] Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies, so as to grant the necessary relief.[6] And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.[7] Whether the petitioners are entitled to recover depends upon an interpretation of 28 U.S.C. §41(1), 28 U.S.C.A. §41(1), and on a determination of the scope of the Fourth and Fifth Amendments' protection from unreasonable searches and deprivations of liberty without due process of law. Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction. Gully v. First National Bank, 299 U. S. 109, 112, 113, 57 S. Ct. 96, 97, 81 L. Ed. 70; Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 199, 200, 41 S. Ct. 243, 244, 245, 65 L. Ed. 577."

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[5]Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979; see also Ex parte State of Virginia, 100 U.S. 339, 346, 347, 25 L.Ed. 676.

[6]Marbury v. Madison, 1 Cranch. 137, 162, 163, 2 L.Ed. 60; Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 569, 570, 50 S.Ct. 427, 433, 74 L.Ed. 1034.

[7]See e.g. Dooley v. United States, 182 U.S. 222, 21 S.Ct. 762, 45 L.Ed. 1074. and cases cited and discussed at pages 228-230, of 182 U.S., at pages 764-765 of 21 S.Ct.; Board of Commissioners of Jackson County v. United States, 308 U.S. 343, 349, 350, 60 S.Ct. 285, 287-288, 84 L.Ed. 313.

We think, as we have pointed out, that all of the cases cited by the district court are quite obviously distinguishable from the case at bar; that a close analysis of them will show this to be the fact; that a consideration of their rationale will show that had a complaint such as the one now before this court been before the courts which decided those cases, it would undoubtedly have been held that there was presented a federal question.

We further believe that the decision of the Supreme Court in *Bell v. Hood,* supra, is clear and controlling on the point. In that case the Supreme Court found the existence of a federal question in the alleged unlawful conduct of the federal officers without any alleged violation of any federal statute. In our case we allege not only unlawful conduct which deprives plaintiff of his constitutional rights but we also allege a violation by the federal officers of a specific federal statute which gives to appellant rights thereunder.

B. CASES OF THE UNITED STATES SUPREME COURT NOT CITED BY THE DISTRICT COURT.

We have heretofore discussed the cases cited by the district court. We now wish to consider a few of the many cases in which the Supreme Court of the United States has found the existence of a federal question for the purpose of demonstrating that the complaint now before this court is of such a nature as to fit into the general pattern which has been developed by that court.

Ex Parte Lennon, 166 U. S. 548, 17 S. Ct. 658, 41 L. Ed. 1110 (1897) involved a petition for a writ of habeas corpus originally filed in the federal court in Ohio. The petition was dismissed and the dismissal was affirmed by the circuit court. The Supreme Court granted certiorari and affirmed the courts below.

The petition alleged that the petitioner was held in custody by the marshal pursuant to an order of the federal court made in a proceeding in which a railway corporation had brought suit against certain individuals to restrain them from interfering with its operations. These individuals had refused to handle the cars of the railway corporation because its employees were not members of an association of locomotive engineers. In the principal action the federal court had enjoined any interference with the operations of the railroad and petitioner was cited for contempt for an alleged violation of the injunction.

In support of his petition for habeas corpus, petitioner argued, among other things, that the injunction was void because in the absence of diversity the federal court had no jurisdiction since the suit did not arise under the Constitution and laws of the United States. With respect to this latter point, the Supreme Court found that the suit did arise under the Constitution and laws of the United States, and in this connection said:

> "We think the bill exhibited a case arising under the Constitution and laws of the United States, as *it appears to have been brought solely to enforce a compliance with the provisions of the*

Interstate Commerce Act of 1887, and to compel the defendants to comply with such act, by offering proper and reasonable facilities for the interchange of traffic with complainant, and enjoining them from refusing to receive from complaint, for transportation over their lines, any car which might be tendered them. It has been frequently held by this court that a case arises under the Constitution and laws of the United States *whenever the party plaintiff sets up a right to which he is entitled under such laws, which the parties defendant deny to him,* and the correct decision of the case depends upon the construction of such laws. As was said in Tennessee v. Davis, 100 U. S. 257, 264: 'Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted.' See also Starin v. City of New York, 115 U. S. 257, 6 Sup. Ct. 28; Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co., 112 U. S. 414, 5 Sup. Ct. 208; Ames v. State of Kansas, 111 U. S. 462, 4 Sup. Ct. 437; Railroad Co. v. Mississippi, 102 U. S. 135." (17 S. Ct. 660.) (Italics supplied.)

In our case as in the case which the Supreme Court was considering in the above decision, we think that the complaint shows that it was brought "solely to enforce compliance with the provisions of" the Act of June 28, 1940, and furthermore, that "the party plaintiff sets up a right to which he is entitled under such laws." As we indicated above (supra p. 12), it

must be assumed at this stage of the pleadings that the appellants denied that right to him. The right, of course, is the right to be "fully informed" of the nature of the charges which prompted his dismissal so that he may have an opportunity by proper affidavit to answer such charges and having answered them to the satisfaction of the Secretary involved, be reinstated to his employment. Certainly "the correct decision of the case depends upon the construction" of the statute. It must be determined by the federal court whether or not the statutory requirement of full information was complied with by the defendants.

Northern Pacific Railway Co. v. Soderberg, 188 U. S. 526, 23 S. Ct. 365, 47 L. Ed. 575 (1903), was an action to enjoin the removal of granite from certain lands held by the plaintiff under a federal grant. The trial court dismissed the action *on the merits* and its ruling was affirmed by the Circuit Court of Appeals for this circuit. On appeal to the Supreme Court, a motion was made to dismiss the appeal for the reason that, since the jurisdiction of the federal court was invoked upon the ground of diversity of citizenship, the decree of the Circuit Court of Appeals was final under the federal statutes and judicial interpretations as they then existed. The Supreme Court pointed out, however, that in order for the judgment to have finality, it must appear that federal jurisdiction was dependent *entirely* upon diverse citizenship. If there was *any other* basis for federal jurisdiction, the decision of the Circuit Court would

not be final and the motion to dismiss the appeal would have to be denied. That is what happened.

Plaintiff claimed under an act of Congress which incorporated it and gave it power to construct a railroad and granted to it every alternate odd-numbered section of public lands, *not mineral,* on either side of the right of way. Defendant contended that the plaintiff's title was defective because the land in question was granite land and consequently not mineral. Of the issue thus raised, the court said:

> "Plaintiff's bill does, indeed, set up a diversity of citizenship as one ground of jurisdiction, but, as it appears that its title rests upon a proper interpretation of the land grant act of 1864 as to the exception of nonmineral lands, there is another ground wholly independent of citizenship under that clause of §1 of the act of 1888 (25 Stat. at L. 433, chap. 866) clothing the circuit court with jurisdiction of all civil suits involving over $2,000 'and arising under the Constitution or laws of the United States.' If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States. Doolan v. Carr, 125 U. S. 618, 31 L. Ed. 844, 8 Sup. Ct. Rep. 1228; *Cooke v. Avery,* 147 U. S. 375, 37 L. Ed. 209, 13 Sup. Ct. Rep. 340. Under the allegations of the bill, the fact that the Land Department had not determined whether the land in question was mineral or nonmineral does not involve a question of fact, as the facts are admitted, but solely a question of law whether land

> valuable for its granite is mineral or nonmineral under the terms of the grant. Morton v. Nebraska, 21 Wall. 660, 22 L. Ed. 639. The fact that a patent issued pending suit is neither set up in the pleadings nor noticed in the opinion of either court. The motion to dismiss must therefore be denied." (23 S. Ct. 366.)

In this case the Supreme Court found that there was a question arising under the laws of the United States, because there was involved the construction of the federal statute with respect to whether or not the words "not mineral" included the word "granite." Certainly if such a question of the construction of a federal statute can be held to be sufficient for these purposes, the controversy here with respect to whether or not the information given by the federal officers was the full information required by the statute must also raise such a question. It hardly seems reasonable to assume that the Supreme Court would be more likely to find the existence of a federal question in a situation involving property rights of corporations than it would in a situation involving a working man's rights to his employment.

King County v. Seattle School District No. 1, 263 U. S. 361, 44 S. Ct. 127, 68 L. Ed. 339 (1923), was an action in the federal court by a school district against a county to recover money allegedly due to the school district under a grant by Congress of funds arising from a forest reserve. Both the district court and this court assumed jurisdiction. On appeal to the Supreme Court, the decrees below were reversed *on*

the merits. However, there was also raised the question of federal jurisdiction. With respect to this, the Court said:

> "Section 24 of the Judicial Code (Comp. St. §991) provides that the District Courts shall have original jurisdiction where the matter in controversy arises under the laws of the United States. In this case the right and title set up by the appellee depend upon the act of Congress. There is involved the question whether that act permits the money so received by the county to be expended by the county commissioners as directed by state legislation, or requires an equal distribution annually for the benefit of public schools and public roads of the county. Appellee contended for the latter construction, and the courts below sustained its claim. If this is not a correct construction of the act, appellee has no cause of action. See Northern P. R. Co. v. Soderberg, 188 U. S. 526, 528, 47 L. Ed. 575, 580, 23 Sup. Ct. Rep. 365; Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. Ed. 1205, 1210, 32 Sup. Ct. Rep. 704. The district court had jurisdiction." (44 S. Ct. 127-8.)

The foregoing three cases are but a few of the many which the Supreme Court has decided upon this question. In all of them the court has found the existence of a federal question when the construction of a federal statute was involved in the action. We submit that the construction of the Act of June 28, 1940, is involved in the case now before the court and upon the reasoning of these cases the court should and must find that a federal question exists.

In addition to these cases, see also *Philadelphia Co. v. Stimson,* 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570 (1912), and *Ickes v. Fox,* 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937), which cases will be discussed below.

II. THE DISTRICT COURT HAD JURISDICTION OF THE ACTION.

In addition to the point made by the district court, *sua sponte* that the suit had to be dismissed because it did not arise under the laws of the United States, the government raised certain other points in its motion to dismiss. We urge upon this court a reversal of the district court not only on the precise point upon which its decision was rendered but also an expression from this court of its views with respect to the other matters raised in the government's preliminary motion so that when the cause is remanded to the district court we may proceed to trial on the merits.

A. JURISDICTION OVER THE SECRETARY OF THE NAVY.

Appellees contend that the Court lacks jurisdiction over the defendant Forrestal, Secretary of the Navy, as his official residence is in the District of Columbia and said defendant has not consented to be sued in this Court.

The facts as set forth in the complaint disclose a shocking and outrageous disregard of the rights of an American citizen and a violation by Admiral Friedell, Commandant of the Mare Island Navy

Yard and predecessor to the defendant Admiral Klein, of the Act of June 28, 1940, expressly providing that civil service employees discharged pursuant to the provisions of said public law shall be *fully informed* of the reasons for the discharge.

Appellant, a Navy Yard employee for *thirteen* years with *permanent* civil service status and belonging to the Masonic Order and the United Federal Workers of America, C.I.O. (T.R., 3), was summarily discharged from the Mare Island Navy Yark, thereby losing all civil service rights including accrued leave with pay. The only reason given appellant for his removal was a vague and indefinite statement by Admiral Friedell (T. R., 5-6).

Authorities hereinafter set forth hold that, under such facts, suit may be maintained for reinstatement against the subordinate officer who performed the act complained of without joining in the complaint the superior officer. For this reason appellee Forrestal, as Secretary of the Navy, is not a necessary party to the suit. No effort was made to serve the complaint and summons upon appellee Forrestal, as appellant was aware that as the office of the Secretary of the Navy is by statute located in the District of Columbia, and that the said appellee could not be sued in this district without his consent. Appellant, in naming Forrestall as a defendant, did so for the purpose of giving the Secretary of the Navy an opportunity to appear before the court and attempt to defend the failure of his subordinate officer to comply with the requirement of Congress as enunciated in the Act of June

28, 1940. Appellee Forrestal, by his motion to dismiss, has indicated refusal to consent to being a party to this suit and therefore under the authorities he is entitled to be dismissed from the suit.

B. THE SECRETARY OF THE NAVY IS NOT AN INDISPENSABLE PARTY AND EVEN IF THE COURT HAS NO JURISDICTION OVER HIM, THE ACTION SHOULD NOT BE DISMISSED AS TO ADMIRAL KLEIN, COMMANDANT OF THE MARE ISLAND NAVY YARD.

In *Neher v. Harwood,* 128 Fed. (2d) 846 (CCA 9, 1942), an action was commenced against the Postmaster of the City of La Verne, California, to enjoin the defendant from carrying into effect a fraud order issued by the Postmaster General. From an order dismissing the complaint an appeal was filed. The first question on appeal that the Circuit Court of Appeals for this Circuit was called upon to decide, was whether or not the Postmaster General was an indispensable party to the suit. In connection with the subject of indispensable parties, the Court stated:

> "In view of the fact that there is confusion in courts as to the necessity of joining superior officers when acts of subordinates are sought to be enjoined, we have made a fairly thorough examination of the decisions and opinions upon the subject in an attempt to discover a principle which will largely reconcile them."

The Court then proceeded to review various decisions on the subject, and concluded that the Postmaster General was an indispensable party. However, it is important to observe that, in its discussion, the

Court recognized that where the superior officer was without authority to act at all in the premises, his actions assuming to authorize action by a subordinate were of no validity and left the subordinate as the actor subject to restraint. Moreover, the Court recognized the power of a court to enjoin a subordinate officer where the action was one to restrain unauthorized action by a government official. It is the position of plaintiff that it is the foregoing rules which apply to the case at bar.

In *Hill v. Darger,* 8 Fed. Supp. 189 (D. C., S. D. Cal.), an injunction was sought against the defendants who were officials authorized to enforce the provisions of a certain license issued by the Secretary of Agriculture. A motion to dismiss was filed on the ground that the Secretary of Agriculture was an indispensable party defendant. The Court found that the license was invalid as to plaintiffs and denied the motion to dismiss. The Court stated:

> "It is well settled, of course, that equity will in a proper case restrain officials of the government from acts constituting an invasion of individual rights where such acts are not authorized by statute or where the statute authorizing them is void because in conflict with some provision of the Constitution."

The Court then concluded:

> "One who performs any act violative of individual rights must find statutory warrant for the authority that he attempts to exercise, and in default of such warrant he may be enjoined."

To the same effect see

Eastman v. United States, 28 Fed. Supp. 807 (D. C., W. D. Wn.);

also

Colorado v. Toll, 268 U. S. 228, 45 S. Ct. 505, 69 L. Ed. 927 (1925).

Applying the rule established in the foregoing authorities, appellee Forrestal, Secretary of the Navy, is not an indispensable party. Admiral Friedell, predecessor to defendant Admiral Klein, had no statutory authority whatsoever to discharge appellant without fully informing him of the reasons for his removal. The discharge under such facts was not authorized by statute. Appellee Admiral Klein as successor to Admiral Friedell "must find statutory warrant for the authority that he attempts to exercise" in refusing to reinstate appellant although demand has been made upon him for reinstatement. The soundness of the rules enunciated in the above authorities is self-apparent. Appellant, a federal civil service employee, has been discharged by the Admiral of the Mare Island Navy Yard. The Navy Yard and the appellee Admiral Klein are within the jurisdiction of this Court. The provisions of the Act of June 28, 1940, abolishing civil service rights during the national emergency were not complied with. As a result thirteen years of labor as a machinist by appellant as well as the protection he had as a permanent civil service employee of the United States were wiped out by a stroke of a pen in the hands of the Commandant of the Navy Yard. In fact, as stated in the complaint,

appellant has been refused accrued leave due to him (T. R. 9-10). Although there has been no compliance with the mandate of Congress as set forth in the statute, appellee Admiral Klein, Commandant of the Mare Island Navy Yard, attempts to avoid righting the grave injustice done appellant by contending that if he wants redress, appellant must go to the District of Columbia and there sue the Secretary of the Navy. Certainly this Court will not countenance such tactics. Appellant, a citizen, a Mason and union member with thirteen years' civil service status, is entitled to his day in Court.

C. THERE IS NO INTERFERENCE SOUGHT WITH THE DISCRETION OF AN EXECUTIVE OFFICER, FOR THE STATUTE PERMITS OF NO DISCRETION.

Respondents contended that by the complaint, the court is requested to interfere with the duly exercised discretion of authorized officers.

The authorities cited to support this argument are not in point. On the contrary, the following rule is well established:

> "Where a statute vests no discretion in an executive officer but to act under a given set of circumstances, or forbids his acting except upon certain named conditions, a court will compel him to act or to refrain from acting if he essays wholly to disregard the statutory mandate; * * *"
>
> *Adams v. Nagle,* 303 U. S. 532, 541, 58 S. Ct. 687, 693, 82 L. Ed. 999, 1006 (1938).

The foregoing rule is applicable herein. The Act of June 28, 1940, vests no discretion in the executive officer.

The statute states the discharged employee shall "be fully informed of the reasons" for his discharge. The reason therefor being that the statute gives the discharged employee the right, after being *fully* informed, to submit an affidavit "to show why he should be retained and not removed". Merely informing appellant that the reasons for his discharge are that he has "been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States" is not a compliance with the statute. The stated reasons are too vague and indefinite to enable appellant to prepare and submit the affidavit referred to in the statute to show why he should be retained as a civil service employee and not removed. Unless appellant is informed of the name of the alleged subversive organization, it is obvious he cannot meet the issue presented as he is unable to file an affidavit stating whether he has or has not attended the meetings thereof. Congress recognized the harshness of the law it was passing, giving to an executive officer summary power to take away from federal employees their civil service rights and therefore Congress placed in the statute a safeguard for the protection of the employee, to-wit, that he be fully informed of the reasons for the discharge. Congress then provided that after the employee has been fully informed, he has the right to file an affidavit to show why he should be reinstated. As set forth in the complaint herein, no effort was made by Admiral Friedell, predecessor to appellee Admiral Klein, to comply with the mandate of Congress. Repeated demands of appellant that he

be fully informed of the reasons for his discharge were ignored or refused. To contend that this Court is being requested to "interfere with the duly exercised discretion of authorized officers" totally ignores the language of the statute which vests no discretion in the officer making the discharge.

Appellees rely upon *Ebelein v. United States,* 257 U. S. 82, 42 S. Ct. 12, 66 L. Ed. 140 (1921). In that case the Court stated:

> "There can be no question from the findings in this case that the plaintiff had the benefit of a hearing according to the regulations then in force * * * the things required by law and regulations were done, and the discretion of the authorized officers was exercised as required by law. It is settled that in such cases the action of executive officers is not subject to revision in the courts." (42 S. Ct. 12.)

It is the contention of appellant that the "things required by law and regulations" were not done with respect to his discharge and therefore the action of the Admiral of the Mare Island Navy Yard in summarily discharging appellant is "subject to revision in the courts".

In *Hammond v. Hull,* 131 F. (2d) 23 (CCA, D. C., 1942), suit was filed by a foreign service officer against the Secretary of State seeking reinstatement. In discussing the question presented, the Court stated:

> "The remedy which, before adoption of the new Rules of Civil Procedure, was known as mandamus, is available under the new rules [Rule 81(b)] and is governed by the same principles as

formerly governed its administration. Those principles may be briefly summarized as follows: (1) The writ should be used only when the duty of the officer to act is clearly established and plainly defined and the obligation to act is peremptory. (2) The presumption of validity attends official action, and the burden of proof to the contrary is upon one who challenges the action. (3) Courts have no general supervisory powers over the executive branches or over their officers, which may be invoked by writ of mandamus. Interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief. (4) When the performance of official duty requires an interpretation of the law which governs that performance, the interpretation placed by the officer upon the law will not be interfered with, certainly, unless it is clearly wrong and the official action arbitrary and capricious. (5) *For it is only in clear cases of illegality of action that courts will intervene to displace the judgments of administrative officers or bodies.* (6) Generally speaking, when an administrative remedy is available it must first be exhausted before judicial relief can be obtained, by writ of mandamus or otherwise.

"The judgment of the District Court dismissing appellant's complaint must be affirmed *unless the action of appellees was clearly a violation of some provision of law, or unless they failed to observe and carry out the procedure provided by law.*"* (131 F. (2d) 25.) (Italics supplied.)

*The court's footnotes, citing cases, are omitted.

In *Wilbur v. United States,* 281 U. S. 206, 50 S. Ct. 320, 74 L. Ed. 809 (1930), the Court stated:

> "Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary." (50 S. Ct. 324.)

In *Farley v. United States,* 92 Fed. (2d) 533 (CCA, D. C., 1937), the court in affirming an order of the district court granting a writ against the Postmaster General and in favor of an employee who had been denied an increased salary grade, relied upon *Wilbur v. United States, supra.*

In *Levin v. Farley,* 107 Fed. (2d) 186 (CCA, D. C., 1939), *certiorari* denied, 60 S. Ct. 377, the lower court denied a postal employee's reinstatement. The court on appeal stated the following rule:

> "Unless, therefore, an examination of the record shows (a) that the action of the Postmaster General in removing petitioner from office was clearly a violation of some provision of law or (b) that the Postmaster General *failed to observe and carry out the procedure for removal as provided by law,* we must affirm the action of the lower court." (Italics supplied.)

The complaint herein furnishes a perfect example of the failure to "observe and carry out the procedure for removal" of civil service employees from Navy Yard Departments as provided by law.

In *Borak v. Biddle,* 141 Fed. (2d) 278 (CCA, D.C., 1944), the Court of Appeals held that plaintiff, a civil service attorney, was entitled to a hearing before being dismissed. In remanding the case to the district court with instructions, the Court said:

> "Considered in this respect, therefore, it is enough for appellant's purposes, at least for the time being, that a declaratory judgment should be made by the District Court establishing his right, prior to dismissal, to notice and the sort of hearing provided by the statute."

It is submitted that appellant herein did not get the "sort of hearing provided by the statute".

See also

Philadelphia Co. v. Stimson, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570 (1912), *infra,*

and

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1932), *infra.*

D. THE AMOUNT CLAIMED IS NOT BEYOND THE JURISDICTION OF THE DISTRICT COURT.

To support the argument that the amount claimed is beyond the jurisdiction of the court below, respondents cite 28 U.S.C. 41(20) and assert that the suit should be in the Court of Claims.

This subdivision is designated "Suits against the United States." The United States is not named as a party defendant, and under a separate heading authorities will be cited demonstrating that this is not a suit against the United States. The complaint seeks

reinstatement of appellant as a civil service employee with compensation for the period of his removal at the rate of pay plaintiff was receiving on the date of discharge. This is the only court that can grant reinstatement and appropriate relief herein.

E. THE SUIT IS NOT AGAINST THE UNITED STATES.

Appellees contend that the suit is in effect a suit against the United States which has not consented to be sued.

The authorities cited to support this argument are not in point. The suit is not in effect against the United States. In *Transcontinental & Western Air v. Farley,* 71 F. (2d) 288 (CCA 2, 1934), cited by appelles in the court below, the following rule was enunciated:

> "Even though the United States is not joined as a formal party defendant, if its interest is so directly involved that it is the real party in interest and any relief that might be given in such a suit will operate against the sovereign, it is an indispensable party, and the suit cannot be maintained." (71 F. (2d) 290.)

However, the court, in the following language, stated that there are exceptions to the foregoing rule:

> "The case at bar is unlike those in which relief by injunction has been granted against the head of an executive department, or other officer, of the government to enjoin an official act on the ground that it was not within the authority conferred, or that it was an improper exercise of such authority, or that Congress lacked the power

> to confer the authority exercised. In those cases the act complained of either involved an invasion or denial of a definite right of the plaintiff [citing cases], or it operated to cast a cloud upon his property [citing cases]." (71 F. (2d) 291.)

The discharge of appellant without fully informing him of the reasons therefor "was not within the authority conferred".

Philadelphia Co. v. Stimson, 223 U.S. 605, 32 S. Ct. 340, 56 L. Ed. 570 (1912), was an action to set aside certain harbor lines so far as they encroached upon the complainant's land and to restrain the Secretary of War from bringing proceedings against the complainant for the reclamation and occupation of the land outside of the prescribed limits. A demurrer to the bill was sustained and the Court of Appeals of the District of Columbia affirmed this ruling. The Supreme Court also affirmed *on the merits.* There was, however, a jurisdictional question raised in that it was contended that since this proceeding was virtually a suit against the United States, it could not be brought without the consent of the United States. With respect to this contention, the court said:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. Little v. Barreme, 2 Cranch. 170, 2 L.ed. 243;

United States v. Lee, 106 U.S. 196, 220, 221, 27 L.ed. 171, 181, 182, 1 Sup. Ct. Rep. 240; Belknap v. Schild, 161 U.S. 10, 18, 40 L.ed. 599, 601, 16 Sup. Ct. Rep. 443; Tindal v. Wesley, 167 U.S. 204, 42 L.ed. 137, 17 Sup. Ct. Rep. 770; Scranton v. Wheeler, 179 U.S. 141, 152, 45 L.ed. 126, 133, 21 Sup. Ct. Rep. 48. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. Osborn v. Bank of United States, 9 Wheat. 738, 843, 868, 6 L.ed. 204, 229, 235; Davis v. Gray, 16 Wall. 203, 21 L.ed. 447; Pennoyer v. McConnaughy, 140 U.S. 1, 10, 35 L.ed. 363, 365, 11 Sup. Ct. Rep. 699; Scott v. Donald, 165 U.S. 107, 112, 41 L.ed. 648, 653, 17 Sup. Ct. Rep. 262; Smyth v. Ames, 169 U.S. 466, 42 L.ed. 819, 18 Sup. Ct. Rep. 418; Ex parte Young, 209 U.S. 123, 159, 160, 52 L.ed. 714, 728, 729, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764; Ludwig v. Western U. Teleg. Co., 216 U.S. 146, 54 L.ed. 432, 30 Sup. Ct. Rep. 280; Herndon v. Chicago, R. I. & P. R. Co., 218 U.S. 135, 155, 54 L.ed. 970, 976, 30 Sup. Ct. Rep. 633; Hopkins v. Clemson Agri. College, 221 U.S. 636, 643-654, 55 L.ed. 890, 894, 895, 35 L.R.A. (N.S.) 243, 31 Sup. Ct. Rep. 654. And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. Noble v. Union River Logging R. Co., 147 U.S. 165, 171, 172, 37 L.ed. 123, 125, 126, 13 Sup. Ct. Rep. 271; American School v. McAnnulty, 187 U.S. 94, 47 L.ed. 90, 23 Sup. Ct. Rep. 33.

"The complainant did not ask the court to interfere with the official discretion of the Secretary

> of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States." (32 S. Ct. 344.)

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937), was an action seeking a decree requiring the Secretary of the Interior to vacate certain orders limiting the water rights of the owners of certain lands within a federal reclamation project. Motions to dismiss the suit on the ground that the United States was an indispensable party and could not be sued without its consent were denied by the trial court and both the Circuit Court and the Supreme Court affirmed.

With respect to the argument that since the suit was one against the Secretary of the Interior, it was one against the United States, the court said:

> "We are thus brought to the decisive question—is the United States an indispensable party defendant? If so, the suits, however meritorious, must fail, since no rule is better settled than that the United States cannot be sued except when Congress has so provided; and here that has not been done. Petitioner's contention that the United States is an indispensable party defendant and, as it cannot be sued, the suits should have been dismissed, is based upon the propositions, as we understand them, that the United States is the owner of the water-rights; that respondents' claims rest entirely upon executory contracts; and that the relief sought is the substantial equivalent of specific performance of these contracts.

"The fallacy of the contention is apparent, because the thus-far undenied allegations of the bill, as already appears, demonstrate that respondents have fully discharged all their contractual obligations; that their water-rights have become vested; and that ownership is in them and not in the United States. *The motion to dismiss concedes the truth of these allegations; but even if they were denied we should still be obliged to indulge the presumption, in favor of the jurisdiction of the trial court, that respondents might be able to prove them.* United States v. Lee, 106 U.S. 196, 218, 219, 1 S. Ct. 240, 27 L.ed. 171; cf. Tindal v. Wesley, 167 U.S. 204, 213 et seq., 17 S. Ct. 770, 42 L.ed. 137. In support of his contention, petitioner relies upon American Falls Res. Dist. No. 2 v. Crandall (C.C.A.), 82 F.(2d) 973; but that decision, in so far as it is not in harmony with the view which we have just taken, must be disapproved.

"The suits do not seek specific performance of any contract. They are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state laws and governmental contracts, but settled and determined by his predecesors in office. That such suits may be maintained without the presence of the United States has been established by many decisions of this court, of which the following are examples: Noble v. Union River Logging R. Co., 147 U.S. 165, 171, 172, 176, 13 S. Ct. 271, 37 L.ed. 123; Philadelphia Co. v. Stimson, 223 U.S. 605, 619, 32 S. Ct. 340, 344, 56 L.ed. 570; Goltra v. Weeks, 271 U.S. 536, 544, 46 S. Ct. 613, 615, 616,

70 L.ed. 1074; Work v. Louisiana, 269 U.S. 250, 254, 46 S. Ct. 92, 94, 70 L.ed. 259; Payne v. Central Pac. Ry. Co., 255 U.S. 228, 238, 41 S.Ct. 314, 65 L.ed. 598. These decisions cite other cases to the same effect. The recognized rule is made clear by what is said in the Stimson Case:

" 'If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded * * * And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process * * *

" 'The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.'

"The decree of the court below is affirmed." (57 S. Ct. 417-8.) (Italics supplied.)

All of the foregoing cases, we respectfully submit, indicate that the various grounds advanced in appellees' motion to dismiss are not well taken and that the district court has jurisdiction over the subject matter of the action as well as over the person of the appellee Klein, and that it can and may grant the relief prayed for.

CONCLUSION.

For the foregoing reasons we urge this court to reverse the order of the district court dismissing the within action for lack of jurisdiction and we further urge this court to remand the case to the district court with instructions to that court to proceed with the trial of this action on the merits.

Dated, San Francisco,
July 31, 1947.

Respectfully submitted,
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